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# California Council for Environmental and Economic Balance

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August 11, 2011

Chairman Mary Nichols and Members of the Air Resources Board  
Air Resources Board  
State of California  
1001 I Street  
Sacramento, California 95814

RE: Comment Letter Regarding the 15-day Notice for the Mandatory Reporting Regulation.

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit coalition of business, labor and public leaders that works to advance policies that protect public health and the environment while expanding economic opportunities for all Californians. CCEEB would like to thank the Chair, Board members, and staff of the California Air Resources Board (ARB) for their diligent and continued work on the implementation of AB 32 and the complex regulatory structure created to reduce greenhouse gas emissions by 2020 in California to 1990 levels. CCEEB is appreciative of the time the enforcement and legal staff has spent working with us on our major concerns with this regulation. While there are some positive steps made in this draft there are some real and persisting concerns with the Mandatory Reporting Regulation (MRR). Attached to these comments is specific regulatory language that would alleviate the concerns that are outlined below. CCEEB is specifically concerned with the:

- 1.) Compliance Timelines especially with additional monitoring requirements.
- 2.) Lack of a Safe Harbor when working with the 3<sup>rd</sup> Party Verifiers
- 3.) Lack of an administrative appeal or review process.

### Compliance Timelines

The current compliance timelines do not allow enough time for a facility to work with their verifier for a positive verification. With the additional monitoring requirements set forth in these 15-day changes, the ARB should examine these timelines or provide a "safe harbor" from enforcement for facilities that are on a compliance pathway towards a positive verification.

### **Safe Harbor**

The ARB should clarify that when a MRR is submitted and the operator is working with the verifier on corrections/edits...no penalties or violations would be assessed during this period.

CCEEB believes that if the pertinent emissions data report did not contain a material misstatement as determined through the verification process, and the newly identified unreported emissions are not due to an intentional error or fraud, the covered entity would be required to submit in a timely manner (measured from the date the shortfall was formally reported to the entity) compliance instruments in the amount of the excess emissions, but there would be no violation of either the mandatory reporting or the market-based compliance mechanism (cap-and-trade) regulations unless the entity failed to submit the additional compliance instruments.

CCEEB further suggests the following:

- The ARB should adjust without penalty all pertinent baselines for which a calculation, verification or reporting from a nonmaterial misstatement or mistake is found.
- If a mistake is made resulting in CO<sub>2</sub>e emissions over the amount reported and compliance instruments not surrendered, the “new” compliance obligation would only be that amount over the 5 percent error margin.
- If a mistake is made resulting in CO<sub>2</sub>e emissions under the amount reported and for which compliance instruments were surrendered, compliance instruments should be returned to the account of a covered entity for the amount over the 5 percent error margin.
- CCEEB is not proposing any restriction or limit on ARB’s efforts to assure program integrity, such that a mistake does not include any tampering of meters or other actions knowingly taken contrary to the AB32 regulations. Similarly, the proposed “safe harbor” for mistakes in no way alters or constricts ARB’s audit and program oversight authority.

### **Appeals and Review**

CCEEB believes that it is entirely appropriate to expect companies to maintain auditable quality data for verification and enforcement purposes. Consistent with our recommendation that reporting protocols be consistent with Climate Action Reserve protocols so that the registry can be relied upon, CCEEB urges that auditing and enforcement be conducted on a statewide basis.

CCEEB has major concerns with the lack of an appeals process for enforcement actions of ‘alleged’ violations of data reporting requirements. In the event that mandatory reporting data at a specific facility is not available due to monitoring equipment failure, out of tolerance calibration, etc., procedures should be specified so that a facility can avoid incurring a violation and the resultant penalties. While alternative emissions calculation methods are specified in the regulations, those particular calculation formulas may not be as accurate as best available data/engineering estimates from the facility. With hundreds of facilities reporting to the ARB it is irrefragable that disputes will arise between the regulated community, 3<sup>rd</sup> party verifiers, and the ARB. Without a formal and structured process there will be no predictability to how these issues will be resolved further exacerbating the uncertainties to an emerging program and the inability to demonstrate compliance while the specific facility issues are resolved. Additionally,



every air district and other statewide boards, departments or offices have statutory structures to resolve disputes in a manner that allows the facility to remain in compliance.

### **Specific Recommendations**

#### **Section 95107**

##### **Subpart a**

- As written, this provision could expose facilities to daily violations for every day that they are late submitting a "verification statement." As happened last year, what if the verifier is late beyond any control of the facility being verified? Facilities should not necessarily be found in violation if they are late. CCEEB also suggests that "verification statement" be dropped from this section.

##### **Subpart b**

- ARB should eliminate subpart b
- OR, incorporate clarifying language that subpart "b" penalties only are triggered in the event an operator fails to correct MRR reporting requirements by the verification deadline date. However, CCEEB suggests a tiered penalty tree, be considered, that would impose high penalties for those operators that have demonstrated non-compliance and lower penalties for those who have demonstrated earnest efforts to comply.
- If the operator obtains a positive or qualified positive verification...Subpart b does NOT apply.
- Incorporate language clarifying the difference between a material misstatement (no penalty) and information submitted with the intent to deceive.
- CCEEB suggest aligning these provisions with those from Section 96014 (c) – page A-281 from the cap-and-trade regulation:

**(1) Falsified, concealed, or covered up by any trick, scheme or device a material fact;**

**(2) Made any false, fictitious or fraudulent statement or representation;**

**(3) Made or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry; or**

##### **Subpart c**

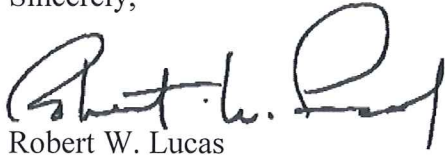
- Clarify that the Subpart c does NOT apply if the operator obtained a positive or qualified positive verification.
- CCEEB would suggest again aligning these provisions with those from Section 96014 (c) page A-281 from the cap-and-trade regulation.

### **Conclusion**

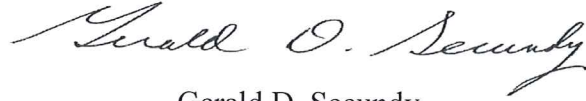
CCEEB would like to thank ARB for considering its comments on the proposed changes to the mandatory reporting regulation. CCEEB is a unique organization that represents a broad cross-

section of the covered entities in California. As such, CCEEB is in a position to represent diverse industry sectors and would like to assist the ARB in developing these ideas further. CCEEB looks forward to continuing our work with ARB staff on our proposals. If there are any questions please call Robert Lucas at (916) 444-7337.

Sincerely,



Robert W. Lucas  
Climate Change Project Manager



Gerald D. Secundy  
President

cc: Matthew Rodriguez, Secretary, California Environmental Protection Agency  
James Goldstene, Executive Officer, California Air Resources Board  
Ellen Peter, Chief Counsel, California Air Resources Board  
Bob Fletcher, Deputy Executive Officer, California Air Resources Board  
Richard Corey, Chief, California Air Resources Board  
Edie Chang, Assistant Division Chief, California Air Resources Board  
Michael Gibbs, Acting Deputy Secretary, Climate Change, Cal/EPA  
The Gualco Group, Inc

## § 95107. Enforcement.

- (a) Each day or portion thereof that any report required by this article remains unsubmitted, or is submitted late, ~~or contains information that is incomplete or inaccurate~~ is a separate violation. For purposes of this section, “report” means any emissions data report, ~~verification statement~~, or other record required to be submitted to the Executive Officer by this article.
- (b) Under-Reported Emissions.
  - (~~b1~~) ~~Each~~ For any covered entity that fails to submit a verified emissions data report, each thousand metric ~~ton~~ tons of CO<sub>2</sub>e emitted but not reported as required by this article is a separate violation.
  - (2) When a covered entity submitted a verified emissions data report for a compliance period but the Executive Officer determined, through an audit or other information, that the entity under-reported its emissions, each thousand metric tons of CO<sub>2</sub>e for which a compliance instrument is submitted under section 95858(a)(2) for that compliance period is a separate violation
- (c) Each failure to measure, collect, record or preserve information required by this article ~~for the calculation of emissions or that this article otherwise requires be measured, collected, recorded or preserved~~ constitutes a separate violation ~~of this article~~ except to the extent that the missing data procedures specified in section 95129 are applied.
- (d) The Executive Officer may revoke or modify any Executive Order issued pursuant to this article as a sanction for a violation of this article.
- (e) The violation of any condition of an Executive Order that is issued pursuant to this article is a separate violation.
- (f) Penalties may be assessed for any violation of this article pursuant to Health and Safety Code section 38580. In determining any penalty amount, ARB shall consider all relevant circumstances, including the criteria in Health and Safety Code section 42403(b), and the degree of culpability for the violation.
- (g) Any violation of this article may be enjoined pursuant to Health and Safety Code section 41513.